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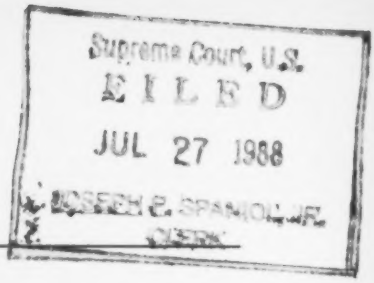

IN THE

Supreme Court of the United States

October Term, 1988

IN RE GARDINIER, INC., DEBTOR

J. LELAND BYRD, d/b/a KILGORE REAL ESTATE,

Petitioner,

v.

GARDINIER, INC., ALVIN BERNSTEIN, AS TRUSTEE OF REORGANIZATION TRUST NO. 1,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Has the United States Court of Appeals for the Eleventh Circuit rendered a decision in conflict with a decision of the Court or of other federal circuit courts of appeals by holding that a bankruptcy judge may dissect a Bankruptcy Code Chapter 11 debtor's executory contract, approving the debtor's affirmance of the provisions of the contract which provide for the sale of its real property, while approving the debtor's rejection of the concomitant contract provision obligating it to pay a brokerage commission to the person who procured the buyer or effected the transaction?

LIST OF ALL PARTIES

1. The petitioner is J. Leland Byrd, d/b/a Kilgore Real Estate, who was the broker in the sale of real property owned by the debtor.

2. Respondent Gardinier, Inc. is the Bankruptcy Code Chapter 11 debtor and seller of real property.

3. Respondent Alvin Bernstein is the Trustee of Gardinier's Reorganization Trust #1, created for the benefit of secured creditors under Gardinier's plan of reorganization.

TABLE OF CONTENTS

	Page
Question Presented	i
List of All Parties	ii
Table of Contents	iii
Table of Authorities Cited	iv
Opinions and Judgments Below	1
Jurisdiction	1
Applicable Statute	1
Statement of the Case	2
Argument	4
Conclusion	10
Certificate of Service	11
Appendix	12

TABLE OF AUTHORITIES CITED

Page

I. CASES

1. Federal:

In re Gardinier, Inc., 831 F.2d 974 (11th Cir. 1987) *(reh'g en banc denied)* ____ F.2d ____ , (Table No. 86-3638, May 16, 1988)... 1, 2, 3, 4, 7, 8, 10

Hurley v. Atchison, Topeka & Santa Fe Railway Co., 213 U.S. 126 (1909) 4, 5, 9

Matter of Steelship Corp., 576 F.2d 128 (8th Cir. 1978) 4, 6, 7, 8

Schokbeton Industries, Inc. v. Schokbeton Products Corp., 466 F.2d 171 (5th Cir. 1972) 4, 5, 6

2. State:

Armstrong v. Illinois Bankers Life Ass'n., 217 Ind. 601, 29 N.E.2d 415 reh'g. denied 217 Ind. 601, 29 N.E.2d 953 (1940)..... 8

Stoneburner v. Fletcher, 408 N.E.2d 545 (Ind. Ct. App. 1980) 8

II. STATUTES

11 U.S.C. §365 ..... 1, 9

28 U.S.C. §1254 1

III. RULES

Sup. Ct. Rule 17, 28 U.S.C. 4

OPINIONS AND JUDGMENTS BELOW

The subject opinion of the Eleventh Circuit *In re Gardinier, Inc.,* is reported at 831 F.2d 974 (11th Cir. 1987) and reproduced in petitioner's appendix at A-11. The opinion of the United States District Court, Middle District of Florida is unreported, but reproduced in petitioner's appendix at A-7. The opinion of the bankruptcy court is reported at 50 B.R. 491 (Bankr. M.D. Fl. 1985) (Pet.'s App. at A-1)[1]

JURISDICTION

The jurisdiction of the Supreme Court is invoked in this matter pursuant to 28 U.S.C. §1254(1). Petitioner seeks review of the order of the United States Court of Appeals for the Eleventh Circuit, dated November 5, 1987, *In re Gardinier, Inc.,* 831 F.2d 974 (11th Cir. 1987). Petition for rehearing en banc was denied on May 16, 1988.

APPLICABLE STATUTE

The Bankruptcy Code of 1978 §365(a), Publ.L.No. 95-598, 92 Stat. 2574, codified as amended 11 U.S.C. §365(a):

> Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

1. References to Petitioner's Appendix are so indicated.

STATEMENT OF THE CASE

On October 8, 1984, Gardinier, Inc. (Gardinier) entered into a contract providing for the sale of real estate to Boyd Burley (Burley) and payment of a real estate commission to Kilgore Real Estate (Kilgore). The contract was signed by Gardinier, Burley, and Kilgore. On February 11, 1985, Gardinier filed its voluntary petition for reorganization relief under Chapter 11 of the Bankruptcy Code. Pursuant to Sections 103, 363(b) and 365 of the Bankruptcy Code, on March 22, 1985, Gardinier filed its motion in the bankruptcy court for entry of orders approving the assumption of the real estate contract and the sale of its property. *In re Gardinier,* 831 F.2d at 975. (Pet. App. at A-13).

At the April 13, 1985, hearing on Gardinier's motion, the Unsecured Creditor's Committee (Committee) objected to payment of Kilgore's brokerage commission, asserting that while the brokerage agreement was contained within the contract, it was a distinct, severable and fully executed agreement which could not be assumed post-petition. Without taking evidence, the court approved of the sale portion of the contract, and reserved ruling on the Committee's objection to the payment of the brokerage fee until June 3, 1985, when it sustained the objection. The bankruptcy court denied Kilgore's motion for rehearing and for stay pending rehearing. On June 14, 1985, Kilgore appealed to the district court, and moved for a stay pending appeal, which the bankruptcy court granted that day. The district court reversed and remanded on August 29, 1985, holding that only one contract was intended by the parties and that the brokerage provision could not be severed from the contract. (Pet. App. at A-10).

On November 5, 1987, the Eleventh Circuit reversed the district court, concluding that the trustee may assume (affirm) the contract for sale of land and, at the same time, reject the brokerage obligation. (Pet. App. at A-18).

Referring to the Eleventh Circuit's opinion, there is no dispute that the parties executed one "instrument" wherein each part

assumed different obligations. The most important obligations for the purposes of this petition are:

1. Gardinier obligated itself to convey real estate to Burley.

2. Gardinier obligated itself to pay Kilgore a 10% commission for Kilgore's "services in making sale of said property . . . at the time of closing th[e] transaction by the delivery of deed."

The Eleventh Circuit's opinion also notes the following intentions of the parties as clearly expressed in the contract:

1. Gardinier intended to convey title to Burley, who intended to pay for the property;

2. Burley intended to post an earnest money deposit of $100,000 with Kilgore and in fact did so;

3. Kilgore intended to abide by the terms of the escrow, depositing it for the purpose of earning interest and accounting to the parties at closing;

4. Gardinier intended to pay Kilgore a commission of 10% for "making" the sale;

5. Burley intended to pay "damages" to Kilgore and Gardinier, in the event that it upset the transaction, in the amount of the earnest money deposit;

6. Kilgore intended to collect its commission upon "making" the sale "at the time of closing."

Gardinier 831 F.2d at 974-5. (Pet. App. at A-12, 13).

This was a contract without ambiguity. The Chapter 11 process, whereby the debtor sought permission to affirm the contract, did not require that the bankruptcy court construe the contract's meaning, or the intentions of the parties.

ARGUMENT

The decision rendered by the Eleventh Circuit is in direct conflict with a decision of the Court as well as decisions of two other circuit courts. Moreover, the exercise of the Court's judicial discretion in granting the writ is justified by the importance of the issue presented in this case. Sup. Ct. Rule 17, 28 U.S.C. More specifically, if the Eleventh Circuit's conflicting opinion is allowed to stand, it will constitute a denigration of the concept of *stare decisis*, and the cloud of uncertainty created by the decision will increasingly burden debtors attempting to contract for goods and services essential to debtors' continued viability.

It is well settled that the trustee (or "debtor in possession") cannot accept the benefits of an executory contract without assuming its burdens as well. *Hurley v. Atchison, Topeka & Santa Fe Railway Co.*, 213 U.S. 126 (1909); *Schokbeton Industries, Inc. v. Schokbeton Products Corporation*, 466 F.2d 171, 175 (5th Cir. 1972); *Matter of Steelship Corp.*, 576 F.2d 128, 132 (8th Cir. 1978). Ironically, in this case the Eleventh Circuit has provided additional support for this principle, in stating that "it is well supported in the case law." 831 F.2d 974, 975, n.1. (Pet. App. at A-13). However, the court circumvented this precept by rendering a decision which totally ignores the principle of *stare decisis*.

In *Hurley*, the Court addressed the question whether the bankruptcy trustee could assume a mining lease while rejecting the obligation to repay advances made pursuant to the lease. The *Hurley* debtor was a mining company acting as lessee under a coal mine lease which required the lessee to supply the railroad with coal. When the bankrupt began to experience difficulties paying its employees, the railroad made advance payments for coal not yet mined in order to keep the mining company solvent. Following the petition for bankruptcy, the trustee attempted to assume the lease, but treat the advanced payments as unsecured debt. 213 U.S. at 127-128. Both the bankruptcy referee and the district court ruled in favor of the trustee, holding that the "agreement for the advance of the money was a separate,

independent, parol contract." 213 U.S. at 128. The Eighth Circuit reversed and the Court affirmed the reversal, stating:

> The railway company was simply paying in advance instead of waiting until the 15th day of the succeeding month, and the money by it loaned was not loaned as an independent pendent transaction, - such as would be made by an ordinary money lender, - but an advancement made in anticipation of the delivery of coal. *To ignore this element and make the bankruptcy proceedings operate to discharge this obligation of the coal company, and leave the transaction as one of an independent loan of money to the coal company, would result in destroying the full, equitable obligations of the coal company, and place the parties in their relations to each other on an entirely different basis from what had been contemplated by them when they entered into this original arrangement.* (emphasis supplied).

Hurley, 213 U.S. at 132.

The Court also agreed with the Eighth Circuit's statement that the arrangement was "so intimately and vitally related to the original contract that [it cannot be stated] that it was intended to be independent and separate from it." 213 U.S. at 133. The Court's reasoning and holding in *Hurley* is even more compelling in this case, as here there was no pendent agreement subsequent to the contract - only one cohesive contract in which the parties assumed different obligations. However, even if two agreements were found in this case it would be impossible for the brokerage and sale agreements to be more "intimately and vitally related."

In *Schokbeton Industries, Inc. v. Schokbeton Products Corp.,* 466 F.2d 171 (5th Cir. 1972), the debtor in possession was a licensee which attempted to affirm an exclusive licensing agreement while rejecting the agreement's provision for timely royalty payments. The Fifth Circuit rejected this attempt to sever the provisions of the contract and thus allowed the licensor to terminate the license

for failure to make royalty payments. In reaching its decision, the court noted that "[t]he filing of an arrangement petition under Chapter XI does not divest the debtor in possession of its contractual rights, *but it likewise does not provide a blanket exemption from contractual obligations.*" *Schokbeton* at 177. (emphasis supplied).

Lastly, in a brokerage commission case almost identical to the case at bar, the Eighth Circuit rendered a decision with which the Eleventh Circuit's holding in this case is in conflict. *Matter of Steelship Corp.,* 576 F.2d 128 (8th Cir. 1978). *Steelship* involved a financially troubled ship builder which sought to raise capital by selling a large interest in the company. A brokerage company was employed which quickly found a buyer. While negotiations were occurring, the seller's condition deteriorated, whereupon it filed a voluntary petition in bankruptcy. Following the petition, the purchaser found by the broker made an offer to purchase which was approved by the bankruptcy referee. Prior to the bankruptcy referee's approval of the sale, the broker filed a claim for commission as an administration expense. The referee denied the claim, finding that (1) the broker was employed to find a stock purchaser as opposed to a purchaser of assets; and (2) the trustee had no agreement with the broker, nor did the trustee ask for or receive any assistance in effectuating the eventual sale. 576 F.2d at 131. The district court adopted both the referee's findings and conclusions.

On appeal, the Eighth Circuit began its analysis by rejecting both of the referee's reasons for denying the claim for commission. The court concluded that if any claim to a fee was sustainable, it had to be on the basis of the contract between the broker and the seller. Thus, the remainder of the opinion focused exclusively on the effect of the seller's bankruptcy on the broker's right to recover a commission. 576 F.2d at 132.

The Eighth Circuit initially observed the "well settled" rule that a trustee cannot accept the benefits of an executory contract without assuming its burdens as well. The court then found that

the trustee "assumed" the bankrupt's (seller's) contract with the broker by proceeding with the sale with full knowledge of the broker's involvement in procuring the buyer. 576 F.2d at 133. The court found that the trustee's actions in proceeding with the sale with full knowledge of the broker's claimed contractual right to a commission constituted an acceptance of the benefits of the bankrupt's contract with the broker. Having found that the trustee accepted the benefits of the brokerage contract, the court concluded that the liabilities (commissions) must be assumed as well.

Despite the similarities between *Steelship* and the case at bar, there are some distinctions. Here, the creditor's committee was successful in affirmatively pursuing the debtor's rejection of its brokerage obligation, while affirming the sale. In contrast, the trustee in *Steelship* did nothing but affirm the sale, from which the court concluded that the trustee constructively assumed the brokerage agreement. 576 F.2d at 133. Regardless of this technical distinction, the result in both cases should be the same: A trustee may not accept the benefits of a brokerage agreement by proceeding with a sale while contemporaneously rejecting the contractual obligation to pay the broker's commission.

The second distinction lies in the form of the brokerage and the sale agreements. In *Steelship,* the brokerage agreement was a *separate agreement* between the seller and broker, "related" to the sales agreement between the seller and purchaser. *Gardinier,* 831 F.2d at 978, n.7. In the case at bar, the three parties involved executed one contract, with each party assuming different *obligations.* In its opinion, the Eleventh Circuit attempted to distinguish *Steelship* by stating that the *Steelship* court never addressed the question whether the brokerage agreement was separate and distinct from the purchase and sale agreement. The court was correct. The *Steelship* court did not need to address this non-issue because it was beyond question that the agreements *were* separate. The critical question was whether the trustee could proceed with the sale agreement without also accepting the entire benefit provided by the brokerage agreement. Like the case at bar,

the *Steelship* trustee could not affirm a sale procured by the broker without contemporaneously accepting all of the benefits provided by the agreement between the seller and the broker. Having accepted the benefit of the brokerage agreement, the *Steelship* court required that the obligations be assumed as well. This result follows regardless of whatever distinction can be made between the brokerage agreement and the sale agreement.

In addition to rendering a decision conflicting with well established precedent, the Eleventh Circuit has established a dangerous precedent of its own. The petitioner recognizes that this petition is not the place for argument on the merits. This petition seeks only to point out the pertinent conflicts created by the Eleventh Circuit's opinion. This task is difficult, however, due to the court's apparent attempt to distinguish well established precedent by affirmatively undertaking to divide the sale and brokerage contact into two separate contracts. In order to perform this dissection, the court was required to circumvent the fact that only one instrument setting forth different rights and obligations was executed by the three parties.

In reaching its conclusion, the Eleventh Circuit relied on two Indiana state court decisions, which hold that a contract is not entire and indivisible simply because it is embraced in one instrument and executed by the same parties. *Gardinier,* 831 F.2d at 976 (Pet. App. at A-15), *citing, Armstrong v. Illinois Bankers Life Ass'n,* 217 Ind. 601, 29 N.E.2d 415 (1940); *Stoneburner v. Fletcher,* 408 N.E.2d 545 (Ind. Ct. App. 1980). The Eleventh Circuit failed to note, however, that this theory of divisible contracts is applied only when there is an enforceable obligation contained within an otherwise unenforceable contract. In short, the Indiana courts and other courts which have applied this theory have had a strong motivation for finding the contract divisible in order to give effect to the contract to the extent possible. No such motivation can be found in this case because every provision

in the contract was enforceable at all times.[2] Seemingly, the Eleventh Circuit reached its pragmatic conclusion because it erroneously thought that allowance of petitioner's brokerage fee would be at the expense of the general unsecured creditors, represented by the Committee. Ironically, the result would have been the exact opposite - petitioner's finding a buyer for the debtor's property resulted in an enhancement of the debtor's estate with more money being made available to the unsecured creditors.

As a practical matter, the windfall given to the debtor's unsecured creditors by this decision does not come without a long term cost for both debtors and unsecured creditors. The proscription against accepting benefits without corresponding liabilities is a compromise position with strong logical support. Congress has determined that it is desirable for a debtor in possession to have the ability to affirm or reject executory contracts. Bankruptcy Code of 1978 §365(a), 11 U.S.C. §365(a). If, however, a debtor in possession were able to affirm and reject different obligations of the same contract, he would be in a position to "place the parties in their relation to each other on an entirely different basis from what had been contemplated by them when they entered into [the] original agreement." *Hurley,* 213 U.S. at 132. This power to accept benefits while rejecting corresponding obligations will discourage contractual agreements with any entity showing signs of financial instability. For example, a real estate broker, following the precedent set by the Eleventh Circuit in this case, would demand payment in advance whenever the seller manifests financial problems suggesting the possibility that it might seek bankruptcy relief. Faced with paying up front or not selling property that will enlarge the debtor's estate (which would benefit the general unsecured creditors), it is impossible to conclude that debtors or unsecured creditors will be aided by

2. The fact that the trustee or debtor-in-possession may apply to the bankruptcy court for permission to assume or reject any executory contract does not make the contract, or any obligation contained therein, "unenforceable" in any legal sense. There is no suggestion that Gardinier's obligation to pay a brokerage commission to petitioner is *legally unenforceable* as a matter of contract law. Section 365(a) of the Bankruptcy Code merely allows the affirmance or rejection of a *contract* within the overall Congressional scheme, which encourages resuscitation of a financially prostate debtor.

this decision. Finally, with regard to the court's unfounded comment that Kilgore's fate "is the harsh reality of bankruptcy," 831 F.2d at 978 (Pet. App. at A-18), it must be noted that the harsh effects of bankruptcy will be greatly exacerbated if a debtor becomes unable to secure the services of brokers who effect sales which infuse cash into the debtor's estate, thus improving his creditors' chances for recovery.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

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By: /s/
John R. Bush

July 25, 1988

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to Rule 28.5(a) I have caused 40 copies of this petition to be deposited in the United States Mail, addressed to the Clerk of the United States Supreme Court, First and Maryland Avenue, N.E., Washington, D.C. 20543, and three copies of the foregoing were furnished by hand delivery to all parties required to be served, namely Robert A. Soriano, attorney for respondent, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., One Harbour Place, 777 South Harbour Island Drive, Tampa, FL 33602, on this 25 day of July, 1988.

/s/

John R. Bush

Subscribed and sworn to before me
this 25 day of July, 1988.

/s/ Billie L. Tuvell

NOTARY PUBLIC, State of Florida
at Large

My Commission Expires: 6/9/89

APPENDIX

50 B.R. 491 (Bkrtcy. 1985)
In re GARDINIER, INC., et al., Debtors.
Bankruptcy No. 85-329 BK T 11.

United States Bankruptcy Court,
M.D. Florida,
Tampa Division.

June 3, 1985.

Debtors moved to assume executory contracts and creditor's committee objected. The Bankruptcy Court, Alexander L. Paskay, Chief Judge, held that debtors could not assume agreements to pay real estate brokers' commission on selling land for debtors even though brokerage agreement was contained in contract for sale of real estate where brokerage agreement was distinct and separately enforceable from real estate contract and where, because brokers had completed their obligations by procuring ready, willing, and able buyers and were only awaiting payment for their services, their agreements were not executory.

Objections sustained.

Bankruptcy 254.1

Debtors could not assume agreements to pay real estate brokers' commission on selling land for debtors even though brokerage agreement was contained in contract for sale of real estate where brokerage agreement was distinct and separately enforceable from real estate contract and where, because brokers had completed their obligations by procuring ready, willing, and able buyers and were only awaiting payment for their services, their agreements were not executory.

Robert J. Wahl, St. Petersburg, Fla., for Creditors' Committee.

Douglas P. McClurg, Jacksonville, Fla., for Debtors.

Jeffery W. Warren, Tampa, Fla., for Texas Gulf, Inc.

Richard Prosser, Tampa, Fla., for Kilgore Real Estate.

ORDER ON OBJECTIONS TO THE ASSUMPTION OF CONTRACTS TO PAY BROKER'S COMMISSIONS

ALEXANDER L. PASKAY, Chief Judge.

This is a Chapter 11 case and the matters under consideration are two Motions to Assume Executory Contracts filed by Gardinier Inc., and Gardiniers [sic] Resorts, Debtors in the above-styled consolidated case. The Debtors sought to assume two contracts for the purchase and sale of two parcels of real estate pursuant to Section 365 of the Bankruptcy Code. While not opposing the sale of the properties, the Creditor's Committee objected to the payment of the broker's commission as set forth in the contracts on the grounds that the brokerage agreement constituted a separate and distinct contract which could not be assumed. The Court granted the Debtors' motions to assume the executory contracts and approved the sale of properties but ordered the commissions due the brokers to be placed in escrow pending a determination of whether the agreements to pay the commission are severable from the purchase and sale contracts.

The facts pertinent to a resolution of this issue as alleged in the motions may be summarized as follows:

On February 11, 1985, the Debtors, Gardinier, Inc. and Gardinier Resorts, Inc. filed a petition for relief pursuant to Chapter 11 of the Bankruptcy Code. Prior to filing its petition, Gardinier Inc. entered into a transaction that involved a parcel of real estate which it owned, known as the Goldstein tract. The terms and conditions of the transaction were memorialized in an instrument titled "Contract for Sale of Real Estate" which was signed by the Debtor, broker, and purchaser and shall be referred to as the Goldstein instrument.

Contained in the Goldstein instrument are the terms and conditions of the sale of the Goldstein tract by Gardinier Inc. to the purchaser, Boyd W. Burley. The terms applicable to the sale include a purchase price of $5,117,100.00; the payment of documentary stamps, recording fees and intangible tax; the proration of taxes, assessments and rents; title insurance and an earnest money deposit of $100,000. For purpose of clarity the collection of these terms relating to the sale of the real estate shall be referred to as the purchase and sale agreement.

In addition to the terms of sale, the Goldstein instrument contains provisions regarding the payment of a brokerage commission which shall be referred to as the brokerage agreement. The text of the brokerage agreement specifically states that the seller "agrees to pay to the broker, as commission for his services in making sale of said property, a sum equal to 10% of the purchase price . . . " The remainder of the terms state in essence that if the buyer fails to perform he forfeits his deposit which will be divided between the broker and Gardinier, Inc. If Gardinier Inc. fails to perform it must pay the broker his full commission.

Like Gardinier, Inc., Gardinier Resorts, Inc. entered into a prepetition transaction involving a parcel of real estate it owned known as the Lido Key Lot. The instrument involving the Lido Key Lot is similar to the Goldstein instrument and contains terms and conditions normally found in a contract for the sale of real estate. Additionally, the Lido Key instrument also contains a brokerage agreement. The terms and conditions of the brokerage agreement are set forth separately at the end of the instrument under a subtitle "Commission Agreement" and are separately signed.

In approving the sale of the Goldstein Tract and the Lido Key Lot, this Court has already ruled that the purchase and sale agreements were executory and assumable but the brokerage agreements were not executory because the brokers had performed their obligations prepetition when they procured ready, willing and able buyers. The question then before this Court is whether the brokerage agreements are distinct and separate contracts from the purchase and sale agreements even though they are contained in the same instrument.

Kilgore Real Estate, the brokers for Gardinier, Inc. in the sale of the Goldstein Tract, have taken the position that the instrument is a single contract and that the brokerage agreement may not be severed from the purchase and sale agreement. The broker bases its position upon the well settled rule of law that if a debtor elects to assume an executory contract he must assume all of its benefits and obligations. A debtor cannot pick and choose those parts he deems desirable and reject the unwanted portions. Based on this premise, the broker argues that Gardinier cannot assume the benefits of the purchase and sale agreement and then reject the brokerage agreement.

In response the Creditors' Committee objects to the payment of the commission and takes the position that brokerage agreements constitute separate and independent contracts which cannot be assumed or rejected, and that the brokerage agreements merely give rise to unsecured prepetition claims which may not be paid out of the proceeds of the sales.

The Court accepts the proposition that an executory contract must be assumed or rejected in its entirety. *In re Mounsour Medical Center,* 11 B.R. 1014 (W.D.Penn. 1981); *In re Rovine Corp.,* 6 B.R. 661, 666 (Bankr.W.D.Tenn. 1980). However, the fact that a transaction is set forth in only one instrument does not alone preclude the existence of several separate contracts. *Bianchi Bros. v. Gendron,* 292 Mass. 438, 198 N.E. 767 (1935); *Stoneburner v. Fletcher,* 408 N.E.2d 545 (2nd DCA Ind. 1980); 4 Corbin on Contracts Section 696. A single document may contain two distinct contracts which may be enforced independently. *Cromwell v. Himes,* 117 Ind. App. 56, 69 N.E.2d 135 (1946).

The issue of severability of a contract is determined by the intention of the parties as evidenced by the terms of the contract. *Dozier v. Shirely,* 240 Ga. 17, 239 S.E.2d 343 (1977). Factors used by some courts in determining the intent include the subject matter, nature and purpose, and apportionment of consideration of the contract. *Stoneburner,* p. 549; *Florida Mtg. Financing, Inc. v. Flagler Plaza Co.,* 308 So.2d 571 (3rd DCA 1975). Moreover, the court in *Flagler,* supra, stated that a contract is indivisible "where the entire fulfillment of the contract is contemplated by the parties as the basis of the arrangement."

In *Flagler* a mortgage broker brought suit against the defendant for payment of a broker's commission arising from a loan commitment application. The defendant requested the mortgage broker to obtain two loans for the defendant, one loan to enable the defendant to purchase a piece of property and the other loan for development of the property. The broker obtained the development loan but not the purchase loan. The court found that the contract was entire because the parties contemplated that both loans had to be produced before a broker's commission would be earned. Therefore, the contract was not severable.

Looking at the instruments in the case at bar, the terms of the instruments address the payment of the broker's commission in the event the sale of the property is not closed. As noted earlier,

the brokerage agreement requires the payment of the commission regardless of t'ıe closing of the sale. Clearly these terms evidence the parties' intent that the sale did not have to close in order for the brokerage agreement to be enforceable. Since the parties did not contemplate that both agreements had to be fulfilled as a condition to enforcing each agreement, the *Flagler* decision indicates that the purchase and sale agreements are severable from the brokerage agreements.

A consideration of the other factors also suggests that the brokerage agreements are severable from the purchase and sale agreements in each instrument. For instance, the nature and purpose of each agreement contained in the instruments are different. One agreement addresses the sale of property. The other agreement contemplates an employment contract which is not dependent upon the closing of the sale.

The consideration for each agreement is entirely separate and distinct. The consideration for the purchase and sale agreement is the payment of the purchase price of the property whereas the payment of the commission stands as consideration for obtaining a ready, willing and able buyer, regardless of whether the sale is concluded. In fact, the brokers' services do not constitute consideration to the buyers because the instruments expressly provide that the sellers, Gardinier and Gardinier Resorts, will pay the brokers' commission. See *Liebowitz v. Wright Properties, Inc.*, 427 So.2d 783 (4th DCA Fla. 1983).

The cases cited previously involve only two parties. In this instance there are three parties. The seller's commitments to the broker are different and independent from those owed to the purchaser. In fact, there are no promises running between the broker and purchaser. This is natural because there are two separate contracts with independent obligations and promises.

The only interrelation between these two agreements that appears from the face of the documents is that all of the terms of the separate agreements are contained on the same piece of paper.

In conclusion, this Court is satisfied that this is not an instance where a debtor is attempting to assume the beneficial portions of a contract and reject those it deems unfavorable. Rather, the instruments in question contain two separate and distinct

contracts. The brokerage agreements are distinct and separately enforceable from the purchase and sale agreements and therefore require independent review. Since the brokers have completed their obligations by procuring ready, willing and able buyers and are only awaiting payment for their services, their contracts are not executory and cannot be assumed. This being the case, payment of their commission out of the sales proceeds shall be denied without prejudice to their right to file a proof of claim for an unsecured, nonpriority, prepetition claim for their brokerage commissions.

Accordingly, it is,

ORDERED, ADJUDGED and DECREED that the Creditors Committee's Objections to the Assumption of Contracts to Pay Broker's Commissions be and the same hereby is sustained. It is further,

ORDERED, ADJUDGED and DECREED that the money held in escrow for payment of the real estate commissions shall be turned over to the Debtors in Possession. It is further,

ORDERED, ADJUDGED and DECREED that Kilgore Real Estate and Michael Saunders & Company may file a proof of claim for their brokerage commissions if so deemed advised.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 85-1208-Civ-T-15
Bankruptcy No.: 85-329-333-BK-T
Adversary No.: N/A

IN RE:
GARDINIER, INC. f/k/a
Gardinier Big River, Inc.,
et al.,
Debtor.

J. LELAND BYRD, d/b/a
Kilgore Real Estate,
Appellant,
vs.
GARDINIER, INC.,
Appellee,

ORDER

This case is an appeal from an order of the bankruptcy court which denied the appellant a brokerage commission from the proceeds of a sale of land. The Court has reviewed the briefs of the appellant and the appellee and has heard their respective oral presentations. The Court has also considered the briefs filed by the amici curiae.

The facts relevant to this appeal are found in the bankruptcy court's order of June 3, 1985. Gardinier, Inc., the debtor, entered into a contract for the sale of real estate known as "the Goldstein tract" prior to filing its petition for relief under Chapter 11 of the Bankruptcy Code. The contract was signed by Gardinier, a broker and the purchaser. After filing its petition, Gardinier requested the bankruptcy court to permit it to assume the executory contract and to approve the sale of the Goldstein tract. The creditor's committee did not oppose the sale; however, it objected to the payment of the brokerage commission described in paragraph 8 of the contract. Although the bankruptcy court permitted Gardinier to assume the contract, it held that the brokerage provision was a separate severable contact which was not executory and therefore not assumable.

As the appellees noted at oral argument, the dispositive issue in this case is whether the document titled "contract for sale of real estate" signed by the buyer, seller and broker is a single contract or merely a document containing two separate contracts. This issue is dispositive of the appeal because of the well settled rule of law that a debtor who elects to assume an executory contract must assume all of the contract's benefits and burdens.

It is undisputed that a court decides if a single document contains two separate contracts by determining the intent of the parties as evidenced by the terms of the contract. Moreover, the bankruptcy court noted that a contract is indivisible where the entire fulfillment of the contract is contemplated by the parties as the basis of the arrangement. Having reviewed the contract in light of these principles, the Court concludes that the "contract for sale of real estate" is exactly that — one contract.

The bankruptcy court determined that the parties did not contemplate the entire fulfillment of the contract as the basis of the agreement because it concluded that the brokerage provision is enforceable regardless of whether or not a closing takes place. The language in the contract, however, does not unequivocally support the court's conclusion.

Paragraph eight of the contract does provide that if the seller refuses to close, the seller must pay the broker his commission. However, that paragraph also provides that if the buyer fails to perform the broker only receives one-half of the buyer's deposit less certain expenses. In addition, paragraph two provides that if the title is found to be defective and the seller is unable to cure those defects, the buyer is entitled to have his deposit returned to him at which time "all rights and liabilities hereunder shall terminate . . ." In this last situation, the broker would not be entitled to anything. Therefore, the broker is clearly not entitled to a brokerage fee equal to ten percent of the purchase price regardless of whether or not a closing takes place, and after finding a buyer and procuring a contract of sale it was incumbent on the broker to effect a closing in order to be entitled to the commission stated in that contract.

As the Florida Association of Realtors noted in its amicus brief, by focusing on the terms of the contract that protect the broker in the event that there is no closing, the bankruptcy court misconstrued the intent of the parties concerning payment of the

commission if the contract does close. Paragraph eight reveals that intent; it indicates that the parties intended that the broker be paid a commission for his services in making (i.e. closing) the sale.

The bankruptcy court also determined that the agreement between the buyer and the seller and the agreement between the seller and the broker were independent. In fact, the court found that the only interrelation between the agreements is that they are contained in the same piece of paper. A closer look at that document reveals the relationship between the provisions.

The contract describes the land for sale and goes on to state:

> . . . which Seller hereby agrees to sell to Buyer and Buyer hereby agrees to buy from Seller, for the price *and upon the terms and conditions as follows:*
>
> * * *
>
> 8. Seller agrees to pay to the broker, as commission for his services in making sale of said property, a sum equal to 10% of the purchase price, at the time of closing this transaction by the delivery of deed as aforesaid . . .

This language indicates that the buyer intended to pay the specified purchase price on several conditions and that one of those conditions was that the broker be paid ten percent of the those conditions was that the broker be paid ten percent of the recited price for effecting the sale. Nothing in the contract indicates that the signatories intended that the seller would ever be entitled to keep the entire stated purchase price without having to distribute a portion of that money simultaneously to the broker who "made" the sale. In fact, it is reasonable to assume that the buyer and the seller would have agreed on a lower stated purchase price if the broker and the seller had entered into some separate contract for the payment of a brokerage fee.

The Court concludes that the signatories to the contract for sale of land did not intend to create two separate contracts within one document. Therefore, the brokerage provision in paragraph eight of that document is part of the entire contract between the buyer, seller and broker and is not severable. Based on the foregoing, it is

ORDERED:

1. The appellees' joint motion to strike portions of the appellant's brief (D 20) is granted to the extent that the Court has not considered any facts which are not a part of the record in this case.

2. The bankruptcy court's order of June 3, 1985 if reversed.

3. This case is remanded to the bankruptcy court for the entry of an order directing the disbursement of a brokerage commission to the appellant in accordance with the terms of the contract assumed by the debtor.

DONE AND ORDERED at Tampa, Florida this 29th day of August, 1986.

/s/
WILLIAM J. CASTAGNA
United States District Judge

Copies to
Counsel of Record

In re GARDINIER, INC., Debtor.

J. Leland BYRD, d/b/a Kilgore Real Estate, Plaintiff-Appellee,

v.

GARDINIER, INC., Defendant,

Alvin Bernstein, as Trustee of Reorganization Trust No. 1, Appellant.

No. 86-3638.

United States Court of Appeals,
Eleventh Circuit.

Nov. 5, 1987.

Chapter 11 debtor moved for orders approving assumption of real estate contract and approving sale of tract of land, and unsecured creditors' committee objected. The Bankruptcy Court, 50 B.R. 491, Alexander L. Paskay, Chief Judge, sustained objection to assumption of brokerage agreement, and broker appealed. The United States District Court for the Middle District of Florida, Docket No. 85-1208-CIV-T-15, William J. Castagna, J., reversed. On appeal, the Court of Appeals, Kravitch, Circuit Judge, held that parties intended that contract under which Chapter 11 debtor sold land and agreed to pay broker commission form two separate contracts, and thus, trustee of liquidating trust established for benefit of debtor's creditors could assume contract for sale of land and reject separate brokerage agreement.

Order of District Court reversed.

1. Bankruptcy 3116

Parties intended that prepetition contract under which Chapter 11 debtor sold land and agreed to pay broker commission form two separate contracts, and thus, trustee of liquidating trust established for benefit of debtor's creditors could assume contract for sale of land and reject separate brokerage agreement, in light of separate and distinct consideration for each agreement, lack of promises running between broker and purchaser, and fact that one agreement addressed sale of property and other contemplated employment contract related to sale. Bankr.Code, 11 U.S.C.A. §§ 365(g), 1101 et seq.

2. Contracts 171(1)
Fact that terms of transaction are set forth in one instrument is not conclusive evidence that parties intended to make only one contract, but is only a factor in determining intent.

Robert Soriano, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tampa, Fla., for appellant.

Jeffrey W. Warren, Bush, Ross, Gardner, Warren & Rudy, Susan B. Morrison, Tampa, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

The issue in this bankruptcy case is whether an agreement to pay a brokerage commission, contained within the same document as a purchase and sale agreement, is a separate and distinct contract from the purchase and sale agreement. The district court, reversing the bankruptcy court, held that the agreements were not separate and distinct. We reverse the district court.

I. BACKGROUND

On February 11, 1985, the debtor, Gardinier, Inc., filed a voluntary petition for reorganization relief under Chapter 11 of the Bankruptcy Code. Before filing its petition, Gardinier had agreed to sell a parcel of land known as the Goldstein tract to Boyd Burley. The terms and conditions of the purchase and sale agreement were memorialized in an instrument entitled "Contract for Sale of Real Estate." The purchase price for the Goldstein tract was $5,117,000, and the earnest money deposit was $100,000. In paragraph eight of the contract, Gardinier agreed to pay the broker, Kilgore Real Estate, a 10% commission for its "services in making sale of said property . . . at the time of closing this transaction by the delivery of deed as aforesaid." Paragraph eight further provided that if the buyer failed to perform, the seller and the broker would divide the deposit, less certain expenses, between

themselves. If the seller failed to perform, it still had to pay the full commission to the broker on demand. Burley signed the instrument on October 4, 1984, and Gardinier and Kilgore signed it on October 8, 1984.

On March 22, 1985, pursuant to sections 363(b) and 365 of the Bankruptcy Code, Gardinier filed a motion with the bankruptcy court for entry of orders approving the assumption of the real estate contract and approving the sale of the Goldstein tract. At the same time, Gardinier sent notice to its creditors and other parties of interest that it intended to sell the Goldstein tract. At the hearing on the motion, held on April 13, 1985, the Unsecured Creditors Committee (the "Committee") raised an objection to the payment of Kilgore's brokerage commission on the ground that the brokerage agreement, although contained within the same instrument as the contract for the sale of the Goldstein tract, was a distinct, separate and fully executed agreement that could not be assumed post-petition. The court did not consider any evidence on this issue during the hearing. Instead, it approved the assumption of the contract for sale between Gardinier and Burley and the sale of the Goldstein tract, but blocked disbursement of the brokerage commission to Kilgore pending a final determination on the issue raised by the Committee.

On June 3, 1985, the bankruptcy court entered an order sustaining the Committee's objection to Gardinier's assumption of the brokerage agreement on the ground that it was a separate, fully executed agreement that could not be assumed post-petition [50 B.R. 491]. The court thus denied payment of the broker's commission out of the sales proceeds, but acknowledged Kilgore's right to file a proof of claim for its unsecured, nonpriority, pre-petition claim to the commission. Kilgore appealed, and prior to oral argument before the district court, the bankruptcy court confirmed Gardinier's reorganization plan, which transferred Gardinier's interest in the appeal to Alvin Bernstein, as trustee of one of two liquidating trusts established for the benefit of Gardinier's creditors. The trustee was therefore substituted as the appellee in the appeal to the district court. In an order dated August 29, 1986, the district court reversed the bankruptcy court on the ground that the agreements were separate and distinct, and thus, because a bankruptcy trustee cannot accept the benefits of an executory contract without also assuming its burdens[1] the

1. Although the district court cited no authority for this proposition, it is well supported in the case law. *See, e.g., Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir.1985); *Lee v. Schweiker*, 739 F.2d 870, 876 (3d Cir.1984); *In re Steelship Corp.*, 576 F.2d 128, 132 (8th Cir.1978).

trustee had to assume the brokerage agreement if it assumed the purchase and sale agreement.

II. DISCUSSION

[1,2] We agree with the trustee and the bankruptcy court that the brokerage agreement was separate from the purchase and sale agreement.[2] As the trustee correctly noted, the intention of the parties is the governing principle in contract construction, *Edward J. Gerrits, Inc. v. Astor Electric Service, Inc.*, 328 So.2d 522, 524 (Fla.Dist.Ct.App.1976); *Rylander v. Sears Roebuck & Co.*, 302 So.2d 478, 479 (Fla.Dist.Ct.App.1974); *Bal Harbour Shops, Inc. v. Greenleaf & Crosby Co., Inc.*, 274 So.2d 13, 15 (Fla.Dist.Ct. App.1973), and, absent ambiguity in the terms of a contract, intent is gleaned from the four corners of the instrument, *see Robert C. Roy Agency, Inc. v. Sun First National Bank*, 468 So.2d 399, 405 (Dist.Ct.App.), *review denied*, 480 So.2d 1295 (Fla.1985); *Boat Town U.S.A., Inc. v. Mercury Marine Division of Brunswick Corp.*, 364 So.2d 15, 17 (Fla.Dist.Ct.App.1978). Furthermore, that the

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2. The bankruptcy court also found that the brokerage agreement was nonexecutory and therefore nonassumable, and both parties addressed this issue in their briefs to this court. For the following reason, we decline to decide whether or not the brokerage agreement was executory. The Bankruptcy Code provides that a trustee may assume or reject an executory contract, subject to court approval. 11 U.S.C. § 365(a). The language of the code is permissive; it is up to the trustee to decide whether to assume or reject an executory contract. *Id.; see also In re Charter Co.*, 52 B.R. 267, 270 (Bankr.M.D.Fla.1985) (assuming contract was executory, nothing in § 365 suggests debtor can be forced to assume it). The only limitation on the trustee's discretion is that it is subject to court approval. However, since courts review a trustee's decision to assume or reject a contract under a traditional "business judgment" standard, the scope of review in this area is narrow. *See, e.g., NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523, 104 S.Ct. 1188, 1195, 79 L.Ed.2d 482 (1984); *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R.R.*, 318 U.S. 523, 550, 63 S.Ct. 727, 743, 87 L.Ed. 959 (1943).

In light of the trustee's position in this case, it is almost certain that if the brokerage agreement were found to be executory, he would elect to reject it. Furthermore, since rejection of the brokerage agreement would be beneficial to the estate and therefore indicative of sound business judgment on the trustee's part, a court would approve the rejection. *See Bildisco*, 465 U.S. at 523, 104 S.Ct. at 1195; *Group of Institutional Investors*, 318 U.S. at 550, 63 S.Ct. at 743. The broker would thus become a general unsecured creditor of the estate. 11 U.S.C. §§ 365(g), 502(g). If, on the other hand, we found that the brokerage agreement was nonexecutory, the trustee would not be entitled to assume it, *see* 11 U.S.C. § 365(a), and the broker would have a general unsecured claim for the amount of the commission, *see* 11 U.S.C. § 501(a). Whether we find the brokerage agreement executory or nonexecutory, Kilgore will end up in the same position. Thus, since the resolution of this issue would have no effect on the outcome of this case, we decline to express any opinion on it.

terms of a transaction are set forth in one instrument is not conclusive evidence that the parties intended to make only one contract, but is only a factor in determining intent. *See* 3A Corbin on Contracts § 696, at 291-92 (1960); *Armstrong v. Illinois Bankers Life Ass'n,* 217 Ind. 601, 615, 29 N.E.2d 415, 420 (1940); *Stoneburn[n]er v. Fletcher,* 408 N.E.2d 545, 549 (Ind. Ct. App. 1980). Thus, we look to the terms of the "Contract for Sale of Real Estate" to determine whether Gardinier, Burley and Kilgore intended to make one contract or two separate contracts.

Although there is only one document memorializing this transaction, there is otherwise no clear indication from the face of the instrument that the parties intended to make only one contract. Instead, the terms of the instrument demonstrate that the parties intended to make two separate contracts. In its order, the bankruptcy court noted three aspects of the transaction that we agree are persuasive evidence of this intent. First, the nature and purpose of the agreements are different. One agreement addresses the sale of property and the other contemplates an employment contract related to the sale of the property. Second, the consideration for each agreement is separate and distinct. Burley agreed to pay Gardinier in excess of $5 million in consideration for the Goldstein tract. Gardinier separately agreed to pay Kilgore a commission as consideration for services rendered in making the sale of the property. There was no consideration flowing between the broker and the buyer. *See Liebowitz v. Wright Properties,* 427 So.2d 783, 785 (Dist.Ct.App.) (broker's services not consideration to buyer if contract expressly provides that seller will pay broker), *review denied,* 440 So.2d 352 (Fla. 1983); *Williams v. Stewart,* 424 So.2d 204, 205 (Fla.Dist.Ct.App.1983) (same). Finally, the obligations of each party to the instrument are not interrelated. Gardinier obligated itself to deliver the deed to Burley upon payment of the purchase price, and it obligated itself to pay a commission to Kilgore upon completion of the broker's responsibilities. There are no promises running between the broker and the purchaser; their only relation is that each has separate contractual rights with the seller.

In its order, the bankruptcy court cited *Florida Mortgage Financing, Inc. v. Flagler Plaza Corp.,* 308 So.2d 571 (Dist.Ct.App.), *cert. denied,* 317 So.2d 443 (Fla. 1975), for the proposition that the brokerage agreement was separate from the purchase and sale agreement. The issue in *Flagler* was whether an agreement to pay a commission to a mortgage broker for

obtaining a purchase money acquisition loan and a permanent end loan should be construed to require part payment of the commission when the broker was able to obtain only the permanent end loan. The court held that because "each and all of [the contract's] parts appear to be interdependent and common to one another and the consideration," it was not divisible and the broker was not entitled to any commission. *Id.* at 572. Relying on this language, the bankruptcy court reasoned that since, in its opinion, the broker would get paid even if the sale never closed,[3] the agreements were not interdependent and, therefore, were separate. The district court reversed the bankruptcy court on the ground that since, in its opinion, the broker was not guaranteed a commission until the deal closed[4] and the buyer was not obligated to pay the seller unless the seller paid the broker a 10% commission from the proceeds of the sale,[5] the agreements were interdependent and therefore indivisible.

Although we agree with the result reached by the bankruptcy court, we note that its reliance on *Flagler,* and the resulting emphasis by it and the district court on "interdependence," is misplaced. The issue in *Flagler,* and in other cases cited by the

3. The bankruptcy court concluded that paragraph eight of the instrument dictated that the broker was entitled to a commission regardless of whether the sale closed. That paragraph provided that if the deal failed to close through the seller's fault, the broker would still be entitled to a 10% commission, and that if the deal failed to close through the buyer's fault, the broker would be entitled to one-half the deposit less expenses.

4. The district court disagreed with the bankruptcy court's construction of the instrument. Relying on paragraph two, which provided that if incurable title defects were discovered then all rights and liabilities under the contract would terminate, the district court reasoned that the sale did have to close in order for the broker to be assured of its commission. As discussed in more detail later in this opinion, the resolution of this particular disagreement between the two lower courts would not shed light on whether the parties intended the agreements to be separate or not. Since only the issue of separateness is before this court, we decline to offer any opinion on which lower court was correct regarding the interdependence of the two agreements.

5. The district court attempted to support this conclusion by asserting that because the preamble to the contract states that the seller agrees to sell and the buyer agrees to buy upon certain terms and conditions, and because paragraph eight, the brokerage agreement, is not explicitly excluded as one of those conditions, it follows that the buyer would be excused if the seller did not pay the broker a commission. We do not think that the language of the contract is clear enough to support the drastic conclusion reached by the district court—that the buyer would be absolved of its obligations if the seller did not pay the broker a 10% commission from the sale proceeds.

parties for the same proposition,[6] was whether numerous promises, each between the same promisor and promisee and contained within one instrument, constituted one or more contracts, and not, as here, whether two promises, each with a different promisor and promisee, constitute one or more contracts. Neither of the courts below nor either party cites any case suggesting that if promises between different parties are dependent or conditioned on one another, it is evidence that the parties intended the agreements to actually form one contract. Moreover, none offers any convincing reason why this should be so. Contracts are often conditioned upon the completion of totally separate agreements. *See, e.g., D.L. Walker & Co. v. Lewis,* 267 Ky. 107, 101 S.W.2d 685 (1937) (lease of stone quarry conditioned upon prospective lessee's award of highway contract); *Pyro Incinerator & Supply Corp. v. Gervais F. Favrot Co., Inc.,* 210 So.2d 356 (La.Ct.App.1968) (award of subcontract conditioned upon award of general contract with city). Purchase and sale agreements frequently condition the buyer's performance on its ability to obtain a mortgage. *See, e.g., Dawson v. Malloy,* 428 So.2d 297 (Dist.Ct.App.), *review denied,* 436 So.2d 99 (Fla. 1983); *Merritt v. Davis,* 265 So.2d 69 (Fla.Dist.Ct.App.1972). In such a case, even though the purchase and sale agreement is conditioned upon the mortgage agreement, and even though the buyer is a party to both agreements, it would be illogical to argue that the parties intended the agreements to form only one contract, even if, for some reason, both agreements appeared in the same instrument. Since the appellee fails to convince us that the independence or interdependence of the agreements is persuasive evidence of intent in this case, the only

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6. *United States v. Bethlehem Steel,* 315 U.S. 289, 62 S.Ct. 581, 86 L.Ed. 855 (1942) (cited by appellee); *Local No. 234, etc. v. Henley & Beckwith, Inc.,* 66 So.2d 818 (Fla.1953) (cited by appellee and appellant); *Rhine v. New York Life Insurance,* 273 N.Y. 1, 6 N.E.2d 74 (1936) (cited by appellee).

In addition, the appellee cites *Smith v. Codos,* 311 So.2d 195 (Fla.Dist.Ct. App.1975), for the proposition that the location of a brokerage fee agreement within a real estate contract makes the brokerage fee agreement a material part of the real estate contract. We do not think that *Codos* applies in this case. The issue in *Codos* was whether a letter evidencing an agreement that a broker's commission would be paid in installments was supplemental to or incorporated into a deposit receipt contract. The author of the letter had clearly stated that "[t]his letter is to be considered part of [the original agreement] regarding the sale of subject property." *Id.* at 196. With such a clear expression of intent, it was not surprising that the court found that "this agreement was incorporated as part of the original deposit receipt contract." *Id.* Unlike in *Codos,* the contract in this case does not clearly express an intent to incorporate one agreement into another. Thus, *Codos* offers little guidance in our task of discerning the parties' intent from the terms of the contract.

indication we have that the parties intended one contract is that the agreements appear in a single document. This by itself is insufficient to overcome the evidence discussed supra that demonstrates the parties' intent to form two contracts.[7]

III. CONCLUSION

Our decision allows the trustee to assume the contract for the sale of land and reject the separate brokerage agreement, relegating Kilgore to the status of a general unsecured creditor. 11 U.S.C. §§ 365(g), 502(g). As a result, Kilgore will be paid from its share of the estate's assets instead of from the proceeds of the sale of the Goldstein tract, and will most likely reap only a percentage of its $500,000 commission. This, however, is the harsh reality of bankruptcy. Because Kilgore has not demonstrated that its agreement with Gardinier entitles it to special treatment, it must suffer the consequences of Gardinier's bankruptcy along with the other general creditors.

The order of the district court is REVERSED.

7. The appellee cites *In re Steelship Corp.*, 576 F.2d 128 (8th Cir.1978) for the general proposition that a trustee cannot reject a brokerage agreement while assuming a related contract for sale. In *Steelship* the court held that when a trustee assumed a contract for the sale of assets of a business, it also assumed an agreement to pay the broker a commission for procuring a buyer. *Id.* at 133. *Steelship*, however, is not persuasive in this case because the precise issue we face—whether the brokerage agreement was separate and distinct from the purchase and sale agreement—was not presented to the court in *Steelship*.